Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,649

HOLLYWOOD HAT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside an Order of the National Labor Relations Board.

Reply Brief of Petitioner K-Mart, a Division of S. S. Kresge Co.

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I.

THE APPROPRIATE UNIT QUESTION.

In his Brief, the General Counsel makes only one argument on the unit question; namely, that the Board is granted great discretion in determining the appropriate unit and that here there was a reasonable exercise of that discretion.[1] But his argument is supported by a soft-pedalling of the Record and wholly fails to come to grips with the real issues. This Court has thereby been deprived of a thorough discussion of matters that should be faced squarely in reviewing the Board's order.

The General Counsel, as did the Board in its Decision below, ignores much of the Record including the Transcript of the Testimony. Equally ignored is Board and Court precedent which control this case and which, he concedes, is still in effect; it is dismissed for the most part in footnotes.

We would like to discuss the General Counsel's argument in some detail. At page 34 of his Brief, the General Counsel begins his argument by reciting the various *retailing relationships* between K-Mart and its Licensees. How these show that K-Mart controls the *labor relations* of its Licensees is not demonstrated.

Then the General Counsel refers to the License Agreement and the Rules and Regulations issued by K-Mart. His manner of arguing from these Regulations is cursory as may be illustrated from these examples:

(a) On page 35 he states: "These rules include provisions relating to hirings and terminations. . . ." He neglects to state that, at page 3 of the Rules, hirings and terminations are *specifically* left to the Licensee.

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[1]References to the Board's answering brief are preceded by the designation, "Resp. Br." and to the page number therein.

(b) On page 35: "Licensees are required to operate their departments with 'sufficient help' during hours established by K-Mart, which has thus substantially limited the Licensees' power to vary or curtail its employees' working hours." Nonsense! The provision merely refers to the hours the Licensee must have his counters open —he may set any hours for any number of employees he wishes and in fact the Licensees do so as testified to at the hearing [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 47; pp. 54-55].

(c) On page 36: "Finally, Licensees are directed to 'Not permit the continuance of a labor dispute involving its department which materially affects the sales or threatens the operations of other Licensees or Licensor.'" This is supposed to prove beyond argument that K-Mart dominates the labor relations of its Licensees. But conveniently omitted is the Board's language in *Bab-Rand Co.*, 147 NLRB 247 (1964) [a case which we infer from the General Counsel's footnote 22 is still good law] which used similar language as an argument to prove the opposite conclusion; *i.e.*, that there was *no* joint employer relationship (The language is quoted at pp. 31-32 of the Opening Brief).

(d) At page 36, it is asserted that the K-Mart License Agreement gives K-Mart control over the Commerce store "specifically including labor relations" of its Licensees. This is not true. Such control is neither specifically nor impliedly provided for by the Agreement.

Equally cavalier is the General Counsel's treatment, in his footnote 20, pp. 36-37, of the alleged "authority" of K-Mart over what are described as mandatory subjects of collective bargaining. Illustrations are:

(a) Because the Rules and Regulations imply that the Licensees are to "provide sufficient help" the General Counsel states that "K-Mart may prescribe the number of employees it deems necessary to operate a Licensee's department." And from this he concludes that this provision gives K-Mart control of its licensees' "employee work loads", citing *NLRB v. Bonham Cotton Mills, Inc.,* 289 F. 2d 903, 904 (5th Cir. 1961). The *Bonham Cotton* case involved an employer who "made substantial changes in the workloads of some employees." The Record shows K-Mart has no power to determine the work load or hours of any Licensee employee [Vol. II-A, pp. 47; 54-58].

(b) The General Counsel notes that under the Rules and Regulations neither K-Mart nor its Licensees will hire an employee or former employee of the other. The General Counsel calls this provision "hiring practice and tenure of employment". Obviously this is aimed at "raiding" and at hiring of people already found undesirable and has nothing to do with control of general hiring of employees or of their tenure of employment.

(c) The General Counsel asserts that "company rules concerning coffee breaks, lunch periods, smoking, employee discipline, and dress are mandatory bargaining subjects" and that the K-Mart Rules and Regulations contain provisions governing them. There is nothing in the Rules about "coffee breaks or lunch periods" and the smoking, discipline and dress provisions are so innocuous as to render absurd any serious attempt to argue that they have the effect of making K-Mart a joint employer. They are merely rules relating to customer-relations and safety requirements.

(d) Finally, the General Counsel states that the K-Mart Rules and Regulations contain provisions governing "similar working conditions". He fails to enumerate such "similar" conditions.

After making the foregoing unsupportable arguments the General Counsel concludes that K-Mart's termination power contributes to the Board's joint employer finding (Resp. Br. p. 37). This suggests that joint organization of the Commerce Store will, hopefully in the Board's eyes, destroy K-Mart's contractual right to terminate a License Agreement which has been breached by a Licensee. Certainly the termination power given K-Mart does not have a thing to do with labor relations. Were the clause not contained in the License Agreement it would be implied as a matter of general contract law.

Avoided by the General Counsel are the yardsticks used for years by the Board (and approved by the courts) in making joint employer findings. Not a word is said about the Board rule that this finding is "determined by which of the two [Licensee or Licensor] has the primary right of control over matters fundamental to the employment relationship." *Duanes Miami Corporation,* 119 NLRB 1331, 1334 (1958). Nor does the General Counsel comment on the Board's oft quoted language that: "The decisive elements in establishing an employer-employee relationship are complete control over the hiring, discharge, discipline and promotion of employees, rates of pay, supervision and determination of policy matters." *Roane-Anderson Co.,* 95 NLRB 1501, 1503 (1951).

In light of these Board precedents how could the General Counsel overlook the fact that the License Agreement specifically provides that the Licensees are to retain charge of their own hirings and firings [Vol.

III, G.C. Ex. 2(c) Employer's Ex. 1, p. 1]; that the Rules and Regulations have a specific section on page 1 entitled "Discipline" which does not give K-Mart the power to discipline employees of Licensees [Vol. III, G.C. Ex. 2(c), Employer's Ex. 2, p. 1]; and the clear, concise, and absolutely uncontradicted testimony of Mr. Sanger, quoted beginning at page 32 of the Opening Brief, showing that none of the elements of joint control are present? And how was the General Counsel able to eschew any reference to the second paragraph of Paragraph 22 of the License Agreement which states that: "[t]he parties do not intend this Agreement to constitute a joint venture, partnership, or lease and nothing herein shall be construed to create such a relationship"; or the fact that in *Bab-Rand Co., supra,* very similar language was used by the Board itself to prove that *no* joint employer relationship existed?

The General Counsel's treatment of *S.A.G.E., Inc. of Houston,* 146 NLRB 325 (1964); *Bab-Rand Co.,* 147 NLRB 247 (1964); and *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964), is equally puzzling. He mentions these cases in passing, at footnote 22, page 39, but airily dismisses them as "inapposite" without further discussion. They have not been specifically reversed by the Board. Yet in each of these cases it is a fair statement to say that the Licensor exercised much greater control over the labor relations of its Licensees than does K-Mart. Actually the quantum of K-Mart's labor relations control is zero. Two of these cases, *Esgro Anaheim* and *Bab-Rand, supra,* involve White Front stores. White Front's Rules and Regulations are appended as Appendix A to this Reply Brief [Vol. III, G.C. Ex. 6, Appendix C]. Appendix B hereof contains the White Front License Agreement. The Court will note from a reading of these documents

that they give White Front tight control over labor matters of the Licensees. White Front was also involved in *New Fashion Cleaners, Inc.,* 152 NLRB 284 (1965), and *Triumph Sales, Inc.,* 154 NLRB 916 (1965), in both of which the Board refused to find a joint employer status.

We are intrigued by the General Counsel's failure to attempt to distinguish the instant case from the four White Front cases, and particularly from *Triumph Sales, supra.* On January 3, 1967 the Chairman of the National Labor Relations Board transmitted to the Executive and Legislative branches of the Government the *Thirty-First Annual Report of the NLRB.* At page 53 of his *Report* the Chairman stated as follows:

> In *Triumph Sales,* the Board found that effective control over the attributes of the employment relationship with employees of the licensee operating the chain's liquor departments, including the handling of grievances, was lodged with the licensee rather than being jointly controlled with the licensor. It therefore concluded that the licensor was not a joint employer of the licensee's employees and directed elections sought by the licensee in units limited to his employees. * * * In *K-Mart,* however, the owner of a retail chain and the various licensees at one of the stores were held to be joint employers of the licensees' employees, and the requested storewide unit of employees was found appropriate. The Board found that the license agreement and related rules and regulations issued by the owner, which even included a provision whereby the owner sought to prohibit the continuance of labor disputes in which the licensees might become involved, established substantially joint control over working conditions and wage rates of the licensees' employees.

It is readily apparent that the Chairman's analysis of *Triumph Sales* should have been applied in this case, since it is K-Mart's Licensees that have "effective control over the attributes of the employment relationship" of their own employees, and not K-Mart. Such control is not "jointly lodged" with K-Mart and it is error to suppose that the facts and Record show otherwise. The Chairman's conclusions are demonstrably false. The fact of the matter is that the White Front License Agreements—not K-Mart's—provides that the Licensees agree to be bound by collective bargaining agreements negotiated by the licensor (See Appendix B pp. 23-26 and see n. 4 of the Opening Brief). From this, one must conclude, if anything, that *White Front* thereby controls the labor relations of its Licensees. How it was found that K-Mart controls the labor relations of its Licensees when no similar provision is found in either its License Agreement or its Rules and Regulations is not explained. The Chairman's *Report* should read exactly the reverse, with the findings as to *Triumph Sales* applying to *K-Mart.*

It is interesting to note that the General Counsel's Brief in this case does not comport with the views of the Chairman as expressed in the *Report.*

Having brushed aside *S.A.G.E., Bab-Rand* and *Esgro Anaheim,* the General Counsel likewise dismissed *Thriftown, Inc.,* 161 NLRB No. 42 (1966), as merely one of a series of cases where the Board made a finding of a joint employer status. There is no answer to the question whether it is the philosophy of *Thriftown* which dictated the decision in the instant case. There is no comment attempting to reconcile *Thriftown* with *S.A.G.E., Bab-Rand,* and *Esgro Anaheim.* Here again we think this Court is entitled to a full and fair discussion of this issue.

The General Counsel (and the Union in its Brief) place great reliance as precedent on the *Checker Cab*

Company case, 367 F. 2d 692 (6th Cir. 1966) and *NLRB v. S. E. Nichols Co.,* 380 F. 2d 438 (2d Cir. 1967) as well as the two *Greyhound* cases, *Boire v. Greyhound Corp.,* 376 U.S. 473, 11 L. Ed. 2d 849, 84 S. Ct. 894, 55 LRRM 2694 (1964); *NLRB v. Greyhound Corp.,* 368 F. 2d 778, 63 LRRM 6434 (5th Cir. 1966). *Checker Cab* was a unique case involving the relationships peculiar to a modern taxicab company in a large city and the Court itself said "this case is *sui generis.*" *Id.* at 696. The *Greyhound* cases were based upon a factual situation under which Greyhound had the right to establish work schedules, the right to assign employees to perform the work, the right to specify the exact manner and means through which these employees did their work and the right to control the straight time wage rates. Moreover, Greyhound supplied detailed supervision. Not one of these facts is present in the case here before the Court. In *S. E. Nichols, supra,* while the Licensees had the right to hire employees, the Licensor thereafter controlled them, determined their wage and fringe benefits, supervised them, had the right to fire them, and had the right to intervene in the Licensees labor disputes. On the facts, none of these cases is applicable.

In closing this portion of our Reply Brief argument, we state what by now must be obvious: The Board is wandering in a welter of confusion. There is no certainty in any of its proceedings involving the joint employer issue. Should Regional Directors (and businesses when drawing license agreements) follow *Bab-Rand Co., Esgro Anaheim, Inc., S.A.G.E.* and similar cases; or the *K-Mart* decision; or *Thriftown?* None agrees with the other. We earnestly believe that this is the case and the time to provide direction for the Board and for those who come before it in this area.

II.
ARGUMENT.

Despite the Board's Novel Attempts to Minimize Them, K-Mart's Objections Remain Viable and Should Be Sustained.

Introduction.

Having previously deprived K-Mart of the right to an administrative hearing on the issues raised by its objections to the election (and in so doing necessarily conceding the accuracy of all employee-witnesses' testimony in support thereof), the Board has, by this action, forced its General Counsel to the unenviable and imposing task of attempting to minimize or explain away the clear implications of unlawful union conduct.

In most instances K-Mart's objections are blithely dismissed for various reasons, which shall be explored below, because the union action under scrutiny allegedly had no "significant impact" on the election (Resp. Br. pp. 53, 54, 58, 60).

In those remaining instances where the union's conduct defies rationalization, the General Counsel has resorted to what can only be interpreted as unwarranted distortions of fact in order to legitimatize the union's pre-election activity.

Accordingly, this portion of the brief will be devoted to pointing up those areas of significant weakness in the Board's argument, demonstrating that the Board's decision on K-Mart's objections is untenable.

A. The Union's Deliberate Misrepresentation of Union Wage Rates, a Matter of Utmost Concern to Employees, Necessitates the Invalidation of the Election.

In answer to K-Mart's assertion that a union leaflet distributed on the evening prior to the election falsely compared union and K-Mart rates (objection 3),

the Board at some length describes its policy of distinguishing between "gross inaccuracies", for which elections will be set aside, and those "minor distortions" which the electorate can evaluate and discount, concluding in the words of the Seventh Circuit in *Olson Rug Co. v. NLRB,* 260 F. 2d 255, 257 that: "Prattle rather than precision is the dominating characteristic of election publicity." (Resp. Br. pp. 53-54).

The difficulty with this glowing generality is that it offers no guidelines for determining in any specific case whether a misrepresentation is "grossly inaccurate" or a "minor distortion."

We suggest that one of the principal factors in making such a determination is to analyze the *subject* of the misrepresentation. Where, as here, that subject is *wages,* the misrepresentation has struck at the very core of collective bargaining objectives. This fact has been recognized by the Court in *NLRB v. Houston Chronicle Publishing Co.,* 300 F. 2d 273 (5th Cir. 1962) which set aside an election declaring:

> "Purportedly authoritative and truthful assertions concerning wages . . . of the character of those made in this case *are not mere prattle; they are the stuff of life for Unions and members the selfsame subjects concerning which men organize and elect their representatives to bargain.*" (Emphasis added).

Similar conclusions based on misleading wage comparisons virtually identical to the one at bar were reached in *U.S. Rubber Co. v. NLRB,* 373 F. 2d 602 (5th Cir. 1967) and *Graphic Arts Finishing Co., Inc. v. NLRB,* 380 F. 2d 893 (4th Cir. 1967). Merely *saying,* as the Board does (Resp. Br. pp. 56-58), that these cases are distinguishable, *hardly* distinguishes them.

Additionally, the Board persists in its contention that the election eve falsity was "cured" by a leaflet mailed to virtually every employee some eleven days prior thereto, which stated the true fact that the union rates applied only after one year of service (Resp. Br. p. 55). Yet even this prior leaflet did not disclose the entire truth—that the given wage rates were the *highest* in each listed category.

Moreover, this doctrine of "cure-back" has heretofore been rejected by the Board itself in *Bowman Biscuit Company,* 123 NLRB 202 (1959), (as was pointed out in the Opening Brief, p. 70), a case where the truthful information was distributed *just one day* before the fraudulent circular. Further, as a matter of logic, employees would surely tend to resolve any conflict between the two leaflets in favor of the more recent one—the false leaflet distributed on election eve.

As a further novel contention the Board asserts that employees could have resolved any doubts fostered by the leaflet by inquiry at Food Giant and White Front Stores, allegedly located in the same shopping center as K-Mart (Resp. Br. pp. 55-56).

There is no evidence in this record, and it is not true, that a White Front store is located in K-Mart's shopping center. Moreover, inquiry at a Food Giant store would be fruitless because the latter is a grocery chain, not a discount operation and under a totally different type of contract. But beyond this, no K-Mart employee, even assuming he had a duty to do so, would have had a reasonable opportunity to check those stores in the few hours left to him before the election, and it is undenied that K-Mart never had an opportunity to answer these representations.

In summary, the record discloses that the misrepresentation was substantial; that the true facts regard-

ing union rates were within the knowledge of the union, and that K-Mart employees did not have either independent knowledge or sufficient time to gain the same, in order to have evaluated the statements. Under a solid line of Board and Court cases, the leaflet in question must be held to have unlawfully affected the election. *Hollywood Ceramics,* 140 NLRB 331 (1962); *Graphic Arts Finishing Co., Inc. v. NLRB, supra.*

B. The Board's Assertion That Union Threats and Coercion Did Not Invalidate the Election Is Contrary to the Facts and Law of This Case.

The Board attempts first to support its finding with respect to the Elaine Williams incident (objection 1) wherein she was told by a union agent, "If you don't join and the union is voted in, you will lose your job" [Vol. III, G.C. Ex. 32, Ex. "A"], by inserting a wholly gratuitous and speculative interpretation of that statement as follows:

> "A reasonable interpretation of this statement was, as indicated by the Regional Director's investigation, merely an over-simplified prediction of what would happen *if* the Union were voted in, and *if* it succeeded in its bargaining for a union-security clause in its contract." (Resp. Br. p. 49).

Yet if Williams' testimony is to be assumed true, the Board is bound to concede the accuracy of her entire affidavit *including the portion which indicates what the union agent told her and that Williams regarded the statement as a threat,* not just the innocuous lecture on a union security clause the Board makes it out to be. Thus Williams further testified:

> "At this point I took the envelope, turned away, and went for my bus and made no reply to his *threat.*" [Vol. II, G.C. Ex. 32, Ex. "A" p. 2]. (Emphasis added).

The Board, in effect, is now telling Elaine Williams that she was wrong; that no threat was intended; that she should have regarded the statement as "merely an oversimplified prediction" (Resp. Br. p. 49). The simple answer to this contention is that this was *not* what the union agent told Williams and that this was *not* the way Williams, reasonably, understood the remark.

The Board cannot have its cake and eat it too; it cannot assume the accuracy of Williams' testimony for purposes of bypassing a hearing and then contest Williams' version as to what the union's agent told her and how she, in turn, interpreted it.

Williams sincerely believed, and reasonably so, that she had been threatened with lost employment. This was sufficient, standing alone, to upset "laboratory conditions" and overturn the election. See *Seamprufe, Inc.,* 82 NLRB 892 (1949), aff'd in *Lane v. NLRB,* 186 F. 2d 67 (10th Cir. 1951) where a similar threat was held to be an unfair labor practice as well.

Next the Board argues that the utterance be disregarded because, if anything, it would "tend to encourage him (her) to vote against the union." (Resp. Br. p. 50). This averment, raised here and elsewhere in the Board's brief with respect to other employees expressly or implicitly threatened (Resp. Br. p. 53) is nothing more than pure speculation. No one, including the Board, has any means of knowing which way Williams voted. However, an intimidated vote for either side is not a rational vote, because fear does not produce rationality. The rule of "laboratory conditions" exists so that voters can exercise a choice free of undue extrinsic coercion or pressure to vote *either way,* in order that the result is a true reflection of uninhibited employee sentiment. Were the Board's argument here to be taken to its logical extreme, the union did not go far enough with its threats; if Williams (or Crab-

tree or Hosey or Castanon) had been physically assaulted, instead of orally threatened, these employees would even more surely have voted against the union. In other words, the more aggravated the union's conduct, the less objectionable it becomes. Such a rule would lead to havoc in organizing campaigns. It must be rejected.

The threat directed toward Linda Crabtree that "if the union gets in, and you don't vote for us, you'll be looking for another job" [Vol. III, G.C. Ex. 32, Ex. "B"] (objection 1) was perhaps even more pointed than that aimed at Williams because the threat of lost employment there was expressly conditioned on the way in which Crabtree voted and, as such, unquestionably amounted to objectionable conduct, if not an unfair labor practice. *cf. Montgomery Ward & Co., Inc.,* 142 NLRB 650 (1963).

The Board first contends that there is no evidence showing the remark was attributable to the union or that it was communicated to other employees. Therefore, it is argued, no atmosphere of fear and reprisal was created (Resp. Br. p. 50). Contrary to this contention, *all* the record evidence establishes that the threat emanated from a union representative. Crabtree stated that although the caller did not identify himself by name, in response to her query, he declared he was a "union representative", [Vol. III, G.C. Ex. 32, Ex. "B"] and the accuracy of her testimony has been conceded. There is no evidence whatever that the union was *not* responsible for the remark. Indeed, the Regional Director evidently did not even attempt to solicit a union denial of this incident [Vol. III, G.C. Ex. 28(a), pp. 5-6].

The fact that this threat was not communicated to other employees is entirely immaterial. Here, of course, the intimidation of a single employee could have

changed the election result. But even if this were not the case the Board, under long-established policy, will set aside an election unless *all* employees are afforded an opportunity to register a free and uncoerced choice regardless of whether its outcome is affected. *G. H. Hess, Inc.*, 82 NLRB 463 (1949); *U.S. Rubber Co.*, 86 NLRB 315 (1959); *National Gypsum Co.*, 133 NLRB 1492 (1961).

As a last resort, the Board argues that Crabtree's free choice was not impaired because her termination, she should have known, couldn't have been effectuated without K-Mart consent and that since the ballot was secret, any fear that the union would discover how she voted should have been dispelled (Resp. Br. p. 51).

The above argument is simply makeweight. Eighteen-year old Linda Crabtree could just as reasonably have believed that the union had the power to fire her if it won the election. All employees know that a victorious union has certain rights, one of which, it here proclaimed to Crabtree, was the right to fire her. Can the Board say, without benefit of a hearing, that Crabtree could not reasonably have believed the union had the ability to carry out this threat? We think not.

The further contention that a secret ballot election negated the threat does not stand inspection. There is absolutely no evidence that Crabtree attended the so-called "anti-union pre-election speech of March 31, 1965", or that she knew the election would be by secret ballot or, if so, its significance. The Board has here indulged once again in pure conjecture to shore up an erroneous conclusion.

With the Leo Hosey incident (objection 2) the Board is backed squarely up against the wall. It must finally, and for the first time, acknowledge that Michael Cas-

tanon exists and that he overheard and corroborated the following threat made by a union agent to Hosey:

> "You, we don't want. You'd better hope that the union doesn't get in" [Vol. III, G.C. Ex. 28(a), Ex. "E"].[2]

even though a frightened Hosey later denied the threat.

The sole contention raised by the Board here, feeble as it is, is that the threat "would appear to constitute an inducement to vote *against* the union, not for it." (Resp. Br. p. 52). Not only is this assertion gross conjecture but within the realm of speculation, it is more probable that the threat would coerce and intimidate the victim into voting *for* the union rather than against it.

Finally, the Board urges that since the remarks were limited in impact to four employees in a unit of eighty, there was no "general atmosphere" of fear and reprisal created and therefore no warrant for setting aside the election (Resp. Br. pp. 52-53). Initially K-Mart does not concede for a moment that no general atmosphere of fear and reprisals existed. For example, Leo Hosey was threatened in front of Michael Castanon [Vol. III, G.C. Ex. 32; Ex. "E"], and, as indicated in the affidavit of Irene Reyes communicated his feelings to a fellow-employee, Richard Castillo, and to Reyes who was within earshot [Vol. III, G.C. Ex. 32, Ex. "F"]. Thus, this incident alone was admittedly relayed to at least three other employees. And it is not straining probability to assume that the various threatened employees told others in the store of these incidents. This precise situation was presented to the Board in a recent case, *Intercontinental Mfg. Co., Inc.,* 167

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[2]The Board has never before, at any stage of this proceeding given any credit or even discussion of the Castanon testimony. See for example Vol. III, G.C. Ex. 28(a), p. 6; G.C. Ex. 35; Vol. I, p. 325 n. 1.

NLRB No. 105 (October, 1967) where employer conduct was held to have affected only six employees out of a total of 730 eligible voters, the Board stating,

> "*However, the restraining effect of coercive conduct is not limited to employees directly involved.* Rather, the Board and courts have long recognized that employer interrogation and threats concerning union activity during a pre-election campaign are likely to receive prompt and wide circulation. Therefore, to evaluate properly the probable effect of conduct which is coercive in nature, *the number of employees directly involved cannot serve as a determinative factor. The controlling factor here is whether the conduct involved tends to interfere with a free and uncoerced choice by the employees.*" (Emphasis added).

Quite obviously the same holds true with respect to union statements.

Finally, even assuming "only" four employees of potentially eighty were affected, to say the election needn't be set aside is, under the circumstances of this case, sheer nonsense. This election was decided by just one vote. If any one of the affected employees was intimidated into voting for the union, its tenuous majority is a sham. Despite the Board's protestations to the contrary, it is beyond question that in each incident heretofore discussed the union greatly exceeded the bounds of permissible pre-election activities, creating an election which was tainted by the effects of its coercive tactics.

C. The Board's Attack on the Employee Platteborze Is Based on Distortions of the Record Evidence and Unwarranted Inferences Drawn Therefrom.

On the very morning of the election a union representative made numerous misstatements on material matters to a 19 year-old employee of the K-Mart store, Carol Platteborze (Objection 6).

The Board's entire approach to this objection has been to characterize Platteborze as a "listening post for management" who solicited answers to "questions she had rehearsed earlier with the K-Mart Assistant Store Manager Robinson" (Resp. Br. pp. 59-60), in an attempt to impute to her a management bias and therefore to nullify the effect of the obviously false statements made to her on election morning by union agents.

There is absolutely no warrant for an inference that Platteborze was pro-management. Indeed, as she put it in her affidavit, "When the union campaign first began in our store, I thought the union sounded like a good idea. Later, questions came to mind, and I wrote these down. I took this opportunity to ask the questions over the telephone." [Vol. III G.C. Ex. 32, Ex. "J"].

Platteborze's affidavit, which the Board has ostensibly assumed to be accurate, discloses only that Platteborze told Assistant Manager Robinson that she intended to ask the union certain questions. There is no evidence that she informed him of the content of any specific question or that they had even been reduced to writing at the time, let alone "rehearsed." It is abundantly clear also that Platteborze later acted to satisfy her own curiosity in asking these questions. Only secondarily did she inquire of the store Assistant Manager whether he would wish to see the answers,

in light of their earlier conversation. The affidavit taken as a whole, contradicts any inference that management suggested the questions to Platteborze or solicited the answers she later obtained.

Implicit in the Board's entire argument is the totally unwarranted assumption that an employee such as Platteborze, who furnishes information to management is necessarily "aligned" with management. It evidently has never occurred to the Board that a neutral employee, desiring to make an informed choice, might wish management's, as well as the union's view, on the questions she had raised.

All of the inferences drawn by the Board with respect to Platteborze have been conjured up out of thin air. Flagrant misrepresentations of fact and law were admittedly made to her by union representatives on the day of the election, in order to influence her vote. This conduct cannot be so easily brushed aside; it requires voiding the election.

D. K-Mart Sustained Its Burden of Proving That a Union Letter Falsely Represented Facts With Regard to the Payment of Union Dues.

The pre-election letter and union newspaper article supplied by K-Mart [Vol. III, G.C. Ex. 32, Exs. "G" and "I", respectively] in support of its charge that the union falsely declared K-Mart employees would not be required to pay double dues (objection 4), the Board contends, did not sufficiently prove this falsity, over the union's assertion that K-Mart employees would not be required to pay double dues (Resp. Br. p. 541).

But what more proof could K-Mart have supplied in advance of the investigation on this objection? There was certainly no right under Board rules to conduct discovery or to examine union files. Note that the Regional Director's approach to this objection, adopted by

the Board, was completely *subjective: he* saw nothing in the letter directly contrary to the newspaper article [Vol. III, G.C. Ex. 28, p. 8]. But the Regional Director needn't have relied upon a personal opinion. The matter of double dues could have been verified objectively, *e.g.,* by an investigation of union records to ascertain what categories of employees were affected by the union's "double dues" resolution. There is no indication that he did so. The Regional Director's failure even to investigate the facts underlying this subject and the Board's concurrence in his procedure, defies explanation, yet is typical of the general approach to K-Mart's objections in this case.

Conclusion.

For the reasons set forth herein, and in K-Mart's Opening Brief, it is submitted that enforcement of the Board's Order be denied.

Respectfully submitted,

CLARK, KLEIN, WINTER, PARSONS & PREWITT,
JOHN DONNELLY,
Attorneys for Petitioner, K-Mart, a Division of S. S. Kresge Co.

Of Counsel:
HILL, FARRER & BURRILL,
STANLEY E. TOBIN

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

STANLEY E. TOBIN

APPENDIX A.

WHITE FRONT
A CORPORATE CUSTOMER STORE

RULES AND REGULATIONS

WORK PERFORMANCE

1. Follow all instructions received from your department head, supervisor or manager.
2. Extend courtesy and cooperation to customers and fellow workers.
3. Be honest in all dealings with customers and the company.
4. Do your work productively and efficiently.
5. Observe safety precautions (see Safety Rules).
6. Practice good housekeeping in your work area or area of responsibility. Keep floor, aisles and doorways clear at all times.
7. Punch your time card:
   A. On reporting for work.
   B. On checking out and in for lunch, dinner, and rest periods.
   C. Upon completion of work schedule.
   D. If your department does not use time cards sign in and out as above on a time sheet.
8. None of the following will be tolerated:
   A. Insubordination.
   B. Engaging in horseplay, quarreling or fighting on company premises.
   C. Use of intoxicants during working days or reporting for work with the odor of intoxicants on your person.
   D. Possession of open bottles of alcoholic beverages on company premises.
   E. Immoral behavior on company premises.
   F. Any fraudulent act or statement.
   G. Unauthorized possession of company funds, property or merchandise.
   H. Punching another employees time card or permitting another employee to punch your time card or signing in or out for another employee or permitting another employee to sign in or out for you where time cards are not used.
   I. Carelessness or intentional mishandling of company merchandise, property or equipment. Defacing of any company property, including rest rooms, walls and doors.
   J. Excessive absence or tardiness, or absence without proper notice to management (leaves of absence require prior written approval).
   K. Suffering wage attachments or harrassment of the company by your creditors.
   L. Using White Front telephones for personal calls, except for emergency calls authorized by store or office management.
   N. WHITE FRONT EMPLOYEES MAY NOT UNDER ANY CIRCUMSTANCES MARK DOWN PRICES OF MERCHANDISE.
   O. All employees, when leaving a store at any time, should leave by doors designated by management. No one is permitted to leave through the receiving doors. ALL PACKAGES ARE SUBJECT TO INSPECTION.
   P. Never use fire doors for entrance or exit. These doors are for emergency use.

DRESS AND APPEARANCE

9. All employees on store premises shall wear visibly displayed White Front badges.
10. All employees wear such items of attire as are furnished by White Front, except in those departments where different attire has been approved by management.
11. Grooming and attire should conform to the following requirements:
    A. Women — Conservative hair style, light makeup, long hose, cardigan sweaters permitted, do not wear fancy jewelry or extreme colors in nail polish.
    B. Men — Conventional haircut, kept combed and neatly trimmed; freshly shaven; clean white shirt, black necktie, freshly pressed, clean trousers. No blue jeans or sport shirts permitted.
12. Employees handling food will observe all rules of neatness and cleanliness required by law.
13. Employees keep personal belongings in the store at their own risk. White Front female employees are provided with lockers to store their purses while working. Valuables should be retained in your personal possession at all times. Employees shall not bring their radios to work.

EMPLOYEES SHOPPING AT WHITE FRONT

14. You may shop during your lunch hour or after completing your work.
    A. Purchases must be taken through the DESIGNATED "Employee Purchase" check stand and must be accompanied at all times by a cash register receipt.
    B. Purchased items shall be taken immediately out of the store or if time does not permit, left at customer service until departure from the store. Employees of lease departments may leave items purchased in their departments if authorized by that department.
    C. Purchases must be removed by the employees in the same manner as by any other customer. Never buy merchandise from truck or service drivers who call at your store.

SAFETY

15. Observe store and plant safety regulations. Take care to prevent accidents and fires. Work safely.
16. Smoke only in authorized places, never on sales floor, stockrooms or dock.
17. Report immediately to your store manager or department head if you have any accident or injury on the job. Report immediately to your store manager or department head accidents or injury suffered by a customer.

RELIEF PERIODS

18. Take your relief period as authorized by your supervisor.
19. Consumption of food and beverages is permitted only in the employees lunch room or at the snack bar.

GIFTS AND SOLICITATIONS

20. Do not solicit gifts or samples from salesmen or suppliers. Any samples received are the property of your employer.

ATTENDANCE, STATUS AND PAY

21. Report to work and leave on time.
22. Any overtime must be approved by your supervisor.
23. Work schedules will be posted in a convenient place, but it is your responsibility to keep informed when you will be expected to work if such a schedule is not posted. If you are sick or will have to be absent because of an emergency, notify your supervisor immediately. Notification to a fellow employee is not proper notice.
24. Advise your store manager or department head promptly of any change of name, address, telephone number, martial status, or number of dependents, so that company and income tax records may be kept current. Forms are available at store validation desk.
25. Cashing of employee payroll checks or personal checks is subject to the same policy as are similar checks presented by customers.

PARKING

26. Park your car in the area designated by the store manager when employee parking is permitted on the White Front lot. The maximum speed limit on the parking lot must not be exceeded.

ANY VIOLATION OF THE ABOVE RULES AND REGULATIONS IS SUBJECT TO APPROPRIATE DISCIPLINARY ACTION INCLUDING DISCHARGE.

I HAVE READ ALL THE ABOVE RULES AND REGULATIONS AND UNDERSTAND WHAT THEY MEAN.

Appendix A

APPENDIX B.

License Agreement.

WHITE FRONT STORES, INC., a corporation, hereinafter referred to as "LICENSOR," and ...., hereinafter referred to as "LICENSEE," hereby agree as follows:

1. DESCRIPTION OF PREMISES.

Under the terms of a written agreement of lease, Licensor is the lessee of the premises commonly known and described as ....., in the City of ....., State of California, on which Licensor is operating a discount department store under the trade name "White Front." In this connection, certain of the departments in said discount department store are operated by Licensor and by licensees.

2. DEPARTMENT OF LICENSEE.

The department which shall be maintained and conducted by Licensee shall be located in the area of the premises hereinabove described in paragraph 1 and more particularly designated and shown on Exhibit "A" attached hereto and approved by the parties hereto. Licensor shall have the right, at any time during the term hereof, to change the floor plan and layout of Licensee's department, provided, however, that any such relocation shall be made at the expense of Licensor and after such relocation Licensee shall have approximately the same size area in a comparable location.

3. MERCHANDISE AUTHORIZED FOR SALE.

Licensor hereby grants to Licensee the exclusive license, right and privilege, for the term hereinafter specified, of conducting and carrying on in his department the retail sale of jewelry, cameras and photographic equipment, including incidental items now sold in the department, and Licensor grants to Licensee and the luggage department in said store, the exclusive license, right and privilege of conducting and carrying on in their departments the retail sale of wallets, and for no other purpose, without the prior written consent of Licensor. In this connection, Licensee agrees at all times to carry and maintain a well stocked, representative line of good quality merchandise which he is authorized to sell in his department, and that he will not engage or have any interest in any other retail business involving the sale of such merchandise elsewhere than the Licensor's said store.

4. TERM OF LICENSE.

This license shall commence on .....,
and shall terminate and end at the close of business on
....,
unless sooner terminated as hereinafter provided in this agreement.

5. COMPENSATION TO BE PAID LICENSOR.

(a) *Minimum Compensation.* In addition to all other payments required of Licensee hereunder, Licensee agrees to pay Licensor a minimum annual compensation, hereinafter sometimes referred to as "Minimum Monthly Compensation," of Six Dollars ($6.00) per square

foot of selling space, in successive equal installments on the first day of each and every calendar month during the term hereof.

(b) *Percentage Compensation.* In addition to the minimum monthly compensation, Licensee shall pay each year but in monthly installments as hereinafter provided, as additional compensation, the amount, if any, by which .... of Licensee's total gross sales exceed the minimum compensation for such year. Said additional compensation is hereinafter somtimes referred to as "percentage compensation."

(c) *Accounting and Settlement.* Licensee agrees to deliver to Licensor within twenty-five (25) days after the close of each calendar month of each year, during the term of this License Agreement, a "Monthly Statement of Gross Sales" (as hereinafter defined), showing the gross sales of Licensee during such month. Within thirty (30) days after the close of each year, during the term of this agreement, or any extension thereof, Licensee agrees to deliver to Licensor a "Certified Statement of Gross Sales," showing the gross sales of Licensee during said year. Concurrently with the submission of any such statement, Licensee shall pay to Licensor the amount shown to be owing to the Licensor. The "Monthly Statement of Gross Sales" shall be a statement of Licensee's gross sales for the calendar month for which the same is required, prepared by Licensee's regularly employed accountant or bookkeeper, and certified by Licensee or a responsible officer of Licensee to be correct. The "Certified Statement of Gross Sales" shall be a complete and appropriately

certified statement made by a Certified Public Accountant and signed by Licensee or a responsible officer of Licensee, showing accurately and in reasonable detail the amount of the gross sales of Licensee for the year for which the same is required.

(d) For the purpose of computing the percentage compensation, the first year shall be deemed to end twelve (12) calendar months after the commencement date of this License Agreement, or in the event the commencement date occurs on a day other than the first day of a calendar month, then twelve (12) calendar months after the first day of that calendar month next succeeding the commencement date and each successive twelve (12) months' period shall be deemed a year.

(3) *Gross Sales.* As used herein "gross sales" shall mean and include the actual gross sales price of all merchandise sold or contracted to be sold, and all charges for labor, services or commodities of any kind made in, from or through the medium of Licensee's department, regardless of whether the aforementioned sales and charges, or any part thereof, be for cash or other consideration or for credit, and if for credit, whether collection be made or not. There shall be deducted in the ascertainment of gross sales the following:

(1) the sales price of merchandise returned for credit or refund;

(2) the actual amounts due or payable to the municipality wherein Licensee is operating his department, the State of California, the Government of the United States or any other governmental authority for or as a sales tax or excise tax;

(3) income covering watch repairs, providing such income does not include any profits to Licensee; and

(4) sales at discount made to employees of Licensor and Licensee and to suppliers but not in excess of One Percent (1%) of Licensee's annual sales.

(f) *Recording of Sales.* Licensee agrees to use for the recording of each and every sale and other gross charges such cash registers, devices, methods and records as are usually used in well-conducted merchandise stores, and to permit Licensor's representatives to inspect original records, methods, devices and machines or whatever, in the judgment of Licensor, shall pertain to the verification of the reports of gross sales as hereinbefore defined. Licensor shall have the right to select and designate an auditor to make an individual audit and investigation to ascertain the correctness and accuracy of all statements and reports presented by Licensee, at Licensor's expense. For the purpose of enabling Licensor to have such audit and investigation conducted, Licensee agrees that the agent or agents of Licensor shall have full access to books and records of account of Licensee of the business conducted in his department.

6. OPERATION OF DEPARTMENT.

Licensee, in his dealings with the general public, shall conduct said department as an integral part of said general department store and/or stores operated by Licensor, and all sales made in said department by Licensee shall be made in the name of Licensor. Licensee shall have no right, either directly or indirectly

or in any manner, to use the name of Licensor, or any other trade name used by Licensor, in any other place of business conducted by Licensee during or after the termination of this License Agreement. Licensee, however, shall purchase in his name and pay for his own merchandise and on his own responsibility and account and shall, likewise, employ and be responsible for help in his department. Neither Licensee, nor any of his employees shall engage in any conduct which shall be detrimental to the operation of Licensor's business. It is understood and agreed that Licensee at all times shall follow the policies adopted by Licensor in connection with the operation of said general department store and/or stores in every respect, including but not limited to, sales and return privileges, lay-a-way plans, charge accounts, sales promotions, signs, displays and hours during which Licensee's department shall remain open. Keys to Licensee's department shall be kept by Licensor and Licensee. Licensee shall not use the trade name "White Front" on any merchandise sold in its department. Licensee shall maintain accurate and detailed records of its purchases and sales, and hereby agrees to permit the Licensor, at all reasonable times during or after the termination or expiration of this License, to examine the same to determine the total amount of sales and the gross mark-up of merchandise sold in said department by Licensee, and to ascertain compliance by the Licensee with all the terms hereof. Licensee shall submit to Licensor, each six (6) months during the term hereof, a financial

statement consisting of a balance sheet and a profit and loss statement covering the operation of said department. It is understood that as part of the general store policy all finance charges made by Licensee to its customers shall not be in excess of finance charges afforded by Licensor to its customers in other departments of the store. In this connection, Licensee agrees to use the finance company designated by Licensor to handle the financing of sales transactions to its customers.

All invoices presented to Licensee by Licensor shall be paid within a period of fifteen (15) days after presentation. Licensor agrees to use its best efforts to remit to Licensee any monies owing to Licensee within fifteen (15) days after receipt thereof by Licensor.

(a) *Competitive Pricing Policy and Gross Mark-Up.* Licensee agrees that Licensee's prices for merchandise sold in its department shall at all times be competition on each item with other like merchandise sold in other stores in the area of the store covered by this License Agreement (for the purpose hereof, "competitive" shall not require the Licensee at all times to meet every lowest price charged by competitive merchants); in addition, Licensee agrees, at the request of the Licensor, to meet the lowest price of any competitive store in the trading area of the store on specific items. In addition thereto, and not in limitation of the foregoing, Licensee agrees that his gross mark-up percentage computed on Licensee's selling price above his actual cost shall not

be in excess of the following percentages with respect to the following categories:

Category	Maximum Mark-Up Percentage Computed on Selling Price
Cameras and Optical Items	25%
Films	20%
Branded Typewriters	20%
Other Typewriters	28%
Electric Shavers	25%
Costume Jewelry	38%
Watches	35%

(b) *Fair Trade Prices.* The terms and conditions provided for in this License Agreement covering pricing of merchandise sold by Licensee to customers in his department shall not relate to merchandise covered by Fair Trade laws which are enforced in the State of California. In this connection, Licensee agrees that he will not knowingly sell merchandise in his department below the established Fair Trade prices covering merchandise.

7. UTILITIES AND ADVERTISING.

(a) Licensor, at its expense, agrees to supply heat, light, power, gas, water and maintenance service for the operation of said department, without additional expense to Licensee; provided, however, that Licensor shall not be responsible for damages or losses of any nature that may result from any interruption of any of the aforesaid services.

Licensee shall provide and pay for his own telephone facilities, stationery, boxes, wrapping material, sales slips and other supplies needed in his department. All such boxes and wrapping material used by Licensee in

his department shall be the same in design and appearance as suggested by Licensor.

(b) All advertising of Licensee's department shall be approved by and publicized under the name of Licensor and the media, content, item and space of such advertising shall be in the sole discretion of and channeled through Licensor's advertising department.

In addition to all other payments and compensation required of Licensee hereunder, Licensee agrees to expend monthly a minimum of Two Percent (2%) of his gross sales made each month during the term hereof, for advertising in newspapers which shall be invoiced to Licensee by Licensor at Licensor's actual cost, excepting that for the month of December of each year during the term hereof Licensee shall expand not less than One Percent (1%) of his gross sales made for said month of December, providing that the total percentage expended by Licensee for said twelve (12) month period is not less than Two Percent (2%) of his gross sales made during said twelve (12) month period. In this connection, it is agreed that if rebates which Licensor shall receive from newspapers covering its advertising shall be less than Ten Thousand Dollars ($10,000.00) per annum in any license year, then Licensee shall not participate in any such rebates. However, should such rebates be in excess of Ten Thousand Dollars ($10,000.00) per annum, then Licensee shall participate in such rebates in the proportion that the number of inches placed and paid for by Licensee bears to the total number of inches placed by Licensor. In the event Licensee fails to expend monthly a minimum of Two Percent (2%) of Licensee's gross sales made each month during the term hereof in advertising in newspapers,

then and in that event, Licensee agrees to pay Licensor as further compensation the difference between the amount Licensee has so expended and said sum of Two Percent (2%).

In connection with "special promotions," Licensee agrees to participate in all newspaper, special newspaper sections or direct mail advertising proposed by Licensor, in the same proportion that Licensee's ads usually occupy in the normal advertising of Licensor, but in any event not less than the ratio that Licensee's sales bear to the total sales made by Licensor and all licensees in said store. However, it is understood that this provision shall not compel Licensee to expend more than Two Percent (2%) of its sales for advertising. In this connection, Licensee agrees to pay the cost of such advertising covering such "special promotions" as may be agreed upon between the parties but which shall be at the same rate as that paid by other licensees of Licensor, but in any event at the actual cost of Licensor. In the event Licensee does not question the correctness of any invoice submitted to Licensee by Licensor covering Licensee's portion of the cost of advertising, within a period of forty-five (45) days after receipt of such invoice, then and in that event, Licensee shall be estopped from thereafter questioning the correctness of said submitted invoice.

Licensee warrants that all advertising submitted to Licensor for publication in its advertisements covering merchandise sold in Licensee's department is not in violation of any federal, state or local laws or ordinances.

Licensee agrees to participate in each newspaper advertisement of Licensor, unless Licensor otherwise agrees.

8. INSURANCE.

Licensee agrees to take out and keep in force during the term hereof, at Licensee's sole expense, workmen's compensation insurance covering all of its employees in its department, and property damage insurance in the sum of Twenty-Five Thousand Dollars ($25,000.00) to protect against liability to the public or property incident to the use of or resulting in any way from accidents occurring in, upon or about said department. Licensee further agrees to carry public liability insurance and products liability insurance in such amounts as Licensor shall determine and which public liability and products liability insurance shall be procured by Licensor and shall be paid for by Licensee. All such insurance shall be written in such manner as to protect the interests of Licensor and Licensee. Licensee shall supply Licensor, during the first month of the term hereof, with a copy of either the insurance policy or a certificate of the insurance company issuing such insurance, and Licensee hereby agrees that the insurance and certificate shall be in such form and substance as shall be acceptable to Licensor, and all such insurance shall not be cancelable until Licensor has been given thirty (30) days' advance notice in writing of such cancellation by the insurance company writing such insurance.

9. COMPLIANCE WITH LAW.

Licensee agrees not to use or permit the department to be used and operated in violation of any law, ordinance or regulation of any governmental authority or in any manner which will constitute a nuisance, and Licensee further agrees that Licensee, at its sole expense, will conform in every respect to all laws, ordinances and

regulations now in force or that are enacted or adopted hereafter which affect the use or occupancy of Licensee's department.

Licensee shall, prior to the commencement of the term of this License Agreement, present to Licensor a photostatic copy of the sales tax permit obtained by Licensee from the California Board of Equalization permitting Licensee to conduct the business provided for in this License Agreement.

10. PAYMENT OF TAXES AND LICENSE FEES.

Licensee shall, at its sole expense, pay all license fees, sales taxes, payroll taxes, personal property taxes, and all other taxes which may be levied or assessed on the business conducted by Licensee or on the fixtures, equipment and merchandise carried in said department and Licensor shall have no responsibility in connection therewith.

11. FIXTURES.

Licensee, at its sole expense, shall install all fixtures, cash registers and equipment necessary to properly display, sell and conduct said department, and in this connection it is understood and agreed that the selection of said fixtures, cash registers and equipment, and the installation thereof, shall be subject to the approval of Licensor. Licensee shall, at all times during the term hereof, maintain, at its sole expense, the upkeep and maintenance of said fixtures, cash registers and equipment.

12. OPTION TO PURCHASE AND COVENANT NOT TO COMPETE.

Upon the termination or expiration of the License Agreement, the Licensee grants to Licensor the options (a) to purchase all of Licensee's right, title and interest in and to the fixtures and equipment then in the department and/or (b) all of Licensee's right, title and interest in and to the good will of the business carried on by Licensee under this agreement. Title to said fixtures and equipment and/or to said good will of said business shall, immediately upon the exercise of said option to purchase by Licensor, be transferred to Licensor and Licensor shall at that time pay Licensee therefor, as follows: for said fixtures and equipment, the cost thereof to the Licensee, including installation and wiring, less the depreciation thereof prorated at the rate of Twenty Percent (20%) per annum from the date of purchase of said fixtures and equipment by Licensee; for the good will, the purchase price shall be Twenty-Five Dollars ($25.00) per location. In the event said fixtures and equipment were purchased by Licensee more than five (5) years prior thereto, then and in that event, Licensor shall pay Licensee the total sum of Twenty-Five Dollars ($25.00) per location for all of Licensee's interest in said fixtures and equipment and said good will of said business.

As part of the consideration paid Licensee for the good will of the business carried on by Licensee under this agreement, Licensee agrees that upon the termination of this agreement it will not conduct or engage in any retail business handling any of the types or categories of merchandise listed in Paragraph 6(a) in any other discount store in Southern California, nor within

an area of five (5) miles from any place or places of business conducted by Licensor in the State of California, for a period of two (2) years from the date of termination of this License Agreement.

In this connection, it is understood that all custom made fixtures and specialized equipment and cash registers used by Licensee in its department are not included in the term "fixtures and equipment".

Licensee shall submit to Licensor, within sixty (60) days after the commencement of the term hereof, a certified statement of the cost of the fixtures, including the cost of installation and wiring, and equipment purchased and installed in Licensee's department.

13. ALTERATIONS.

Licensee shall make no alterations, additions or improvements in or to Licensee's department without the prior written consent of Licensor. Licensor may make necessary or proper alterations, additions or improvements to said department and no exercise of any such rights shall entitle Licensee to damages for injuries or inconvenience occasioned thereby, but such work shall be done in such manner as to cause Licensee the least inconvenience practicable.

14. IDENTIFICATION.

Licensor shall not be liable to Licensee or any other person for or on account of any injury or damage of any kind whatsoever to persons or property occasioned in or about Licensee's department or wheresoever arising, or resulting from any patent or latent defect, structural or otherwise, in the construction, condition or present or future lack of repair of the buildings and improvements in said department. Licensee in-

demnifies Licensor against and agrees to hold Licensor harmless from any loss, damage, claim of damage, liability or expense, arising out of or resulting from any of the matters or things hereinabove specified, and from and against any damage or liability arising from any injury or damage or claim of injury or damage of any kind whatsoever to persons or property occasioned in or about said department during the term hereof and due, directly or indirectly, to the use, misuse or disuse by Licensee or by any of its agents, servants, employees or to the condition of said department or any part thereof or any equipment thereof or therein, or arising out of any failure of Licensee in any respect to comply with any of the requirements or provisions of this License Agreement.

15. DAMAGE OR DESTRUCTION.

In the event of damage to or destruction of Licensee's department by fire, earthquake or any other cause, so as to make it impossible to carry on business therein, and if said department cannot be repaired within sixty (60) working days, this agreement may thereupon terminate at the option of either Licensee or Licensor by giving written notice to the other party within thirty (30) days after the happening of such casualty. If this agreement is not so terminated, Licensee shall be entitled to a proportionate reduction in the payment of compensation provided for herein until said repairs are completed. Further, should Licensee be inconvenienced as the result of repairing said damage or destruction, Licensee shall not be entitled to any damages during the period of repair for inconvenience or denial of possession of said department. If this agreement is so terminated and Licensor shall, at a sub-

sequent date, reopen said jewelry and camera department, then and in that event, this License Agreement shall be revived for the balance of the term of this license.

16. NATURE OF AGREEMENT.

This agreement is not intended to create and shall not be considered as creating any partnership relationship between the parties hereto, or any relationship between them other than that of Licensor and Licensee, nor shall either party be liable for the debts of the other.

17. BANKRUPTCY AND INSOLVENCY.

If, during the term of this License Agreement, an involuntary petition in bankruptcy is filed against Licensee, and a Receiver is appointed, and is not removed within five (5) days, or if a voluntary bankruptcy petition, or a petition for reorganization or arrangement under any of the laws of the United States relating to bankruptcy, be filed by Licensee or be filed against Licensee, or should Licensee make an assignment for the benefit of its creditors, the occurrence of any such contingency shall be deemed to constitute and be construed a violation of the terms of this License Agreement, and Licensor, at its election, may terminate this License Agreement immediately upon the occurrence of any of said events. Should Licensor elect to terminate this License Agreement upon the happening of any such event, then Licensor, at the expense of Licensee, may remove all of Licensee's fixtures, equipment, inventory and all other property of Licensee from Licensee's department and place the same in storage in the name of Licensee. No person, firm or corporation,

other than Licensee, shall have the right to occupy the department of Licensee by virtue of any bankruptcy, receivership, insolvency or reorganization proceedings or suit in law or in equity. Further, in the event any of the assets of Licensee's department are levied upon under any attachment, garnishment or execution, or should a receiver or keeper be placed in said department resulting from any proceeding filed against Licensee in law or in equity, Licensor, at its election, may terminate this License Agreement unless such levy is released within five (5) days or said keeper or receiver is withdrawn within twenty-four (24) hours from the time such levy is made or said receiver or keeper is placed in said department.

18. RIGHTS AND DUTIES ON TERMINATION.

Upon the termination of the License hereby granted, Licensee shall not sell or permit the sale of any merchandise or of any fixtures or equipment from the premises and Licensee shall not in any way advertise or permit the advertising of the termination of its license or its right to sell merchandise in the department. Upon any such termination, Licensee shall immediately surrender said department to Licensor and, except as otherwise provided in this License Agreement, remove therefrom all stock in trade and other property which Licensee may be entitled to remove, and shall, at Licensee's sole cost and expense, do all things necessary to place said department in the same condition as before the use thereof by Licensee, reasonable wear and tear excepted. The rights herein granted to Licensor shall be in addition to any other rights or remedies to which Licensor may be entitled under law.

19. HOLDING OVER.

Any holding over by Licensee beyond the date of termination of this License Agreement as herein provided, shall for all purposes be construed to be on a day-to-day basis, subject to all of the terms, conditions and restrictions of this License Agreement.

20. ADDITIONAL EVENTS OF DEFAULT.

In addition to any other right granted herein or by law on the part of the Licensor to cancel or terminate this agreement, Licensor shall have the right to terminate this agreement as follows:

(a) In the event, during the first two (2) years of the term of this License Agreement, of the death of Francis J. Esgro or his physical disability which renders him unable, for a period of six (6) months to render full time executive services to the Licensee, and if, during the six (6) full calendar months immediately following the month of his death or such disability, as aforesaid, as the case may be, the aggregate gross sales of the jewelry and camera departments in all the White Front stores operated by Francis J. Esgro, or by corporations owned by him, in operation at the time of such death or disability is eighteen (18), or more, percent less than such sales in the same stores during the like six (6) month period in the preceding year, Licensor shall have the right, at any time within three (3) months following the expiration of such six (6) month period, to cancel and terminate this License Agreement.

(b) If Francis J. Esgro ceases to continue to act as full time chief executive officer, as herein required, of the Licensee otherwise than because of his death or

disability, as aforesaid, the Licensor shall have the right, at any time within three (3) months following the date when the Licensor has actual notice and knowledge of such cessation, to cancel and terminate this License Agreement.

(c) If any of the capital stock of the Licensee or of any other interest in the operation of the licensed department is disposed of by Francis J. Esgro, or is transferred whether by operation of law or otherwise, the Licensor shall have the right at any time within three (3) months following the date when the Licensor has actual knowledge of such disposition or transfer to cancel and terminate this License Agreement, but such restriction shall be inapplicable if such disposition is either

(i) less than Fifty Percent (50%) thereof, during his lifetime, to members of his immediate family who enter into legally binding and effective agreements, satisfactory to Licensor's attorneys, prohibiting further transfer or disposition of such stock or interest and assume all the obligations and restrictions of the License Agreement; or

(ii) upon his death, to any member of Francis J. Esgro's immediate family, by Will or intestacy, who enters into an agreement as above provided in Subparagraph (i); or

(iii) sales in an underwritten "public offering" to not less than three hundred (300) purchasers of stock, but only if and so long as Francis J. Esgro retains not less than Twenty Percent (20%) of the equity ownership of the selling corporation and he continues to be the principal, full time, executive officer.

21. This License Agreement is one of a number of similar agreements entered into simultaneously herewith between White Front Stores, Inc., Licensor, and corporations which are wholly owned subsidiaries of Esgro, Inc., a corporation, Licensee, for the operation of jewelry and camera departments in White Front stores in the State of California, and similar agreements may hereafter be entered into with respect to additional White Front stores in said State of California. It is expressly understood and agreed that, in addition to any other termination provisions contained herein, due to the default of Licensee, this License Agreement shall, at the option of the Licensor, terminate upon the termination of any one or more of such other license agreements, notwithstanding that Licensee may not be in default hereunder.

22. TERMINATION UPON DEFAULT.

Each of Licensee's obligations under this License Agreement is a condition, the time of performances of each is of the essence of this agreement, and the strict performance of each shall be a condition precedent to the right of Licensee to have this agreement continue in effect. In this connection, it is understood and agreed that if Licensee fails to perform any of Licensee's obligations under this agreement, Licensor shall notify Licensee of the nature of Licensee's default, and if it is of such nature as can be cured and is not cured and continues in effect for a period of fifteen (15) days after said notice is given to Licensee (except as otherwise provided in this agreement), then Licensor may terminate forthwith this License Agreement and all rights granted to Licensee hereunder.

23. EXPENSES OF INSTALLATIONS AND IMPROVEMENTS.

Licensee agrees that, as heretofore, all expenses, including but not limited to improvements, installations, fixtures, plumbing and electrical wiring necessary for the operation of said department, shall be borne and paid for by Licensee.

24. LICENSEE TO DEVOTE FULL TIME.

Licensee agrees that Francis J. Esgro, during the term of this agreement or any extension thereof, will devote his full time and efforts to the operation of said jewelry and camera department and that neither the Licensee nor Francis J. Esgro shall have any other interests or business activities, directly or indirectly, which are in whole or in part competitive with those of the Licensor or the Licensee or which require Francis J. Esgro's personal time, services or advice; the foregoing restrictions shall not prevent Francis J. Esgro from operating his wholesale and import business, if said import and wholesale business is, to the extent that it deals directly with consumers or users, limited to typewriters, invoicing machines, adding machines and computers only at one showroom in the Los Angeles area and one showroom in the San Francisco area and does not interfere with or prevent the full performance by him of all of his chief executive duties and services to and for the operation of the licensed department.

25. COLLECTIVE BARGAINING AGREEMENTS.

(a) The parties hereto recognize that there exist current collective bargaining agreements between Licensor on the one hand and Retail Clerks Union Locals 324,

770, 905, 1167 and 1428 on the other hand, hereinafter collectively referred to as the "White Front-Retail Clerks Agreements."

(b) Licensee is familiar with the terms and provisions of said White Front-Retail Clerks Agreements and, to the extent permitted by law, agrees to be bound by the terms and provisions and any amendment or extension of the White Front-Retail Clerks Agreement which covers the White Front employees in the store or stores in which said Licensee operates, and further agrees, to the extent permitted by law, upon request of the Retail Clerks Union local which is party to such White Front-Retail Clerks Agreement, to execute a copy of said Agreement.

(c) Without limiting the generality of the foregoing, Licensee is aware of and accepts the provisions of Appendix C, Section 2 of the White Front-Retail Clerks Agreements which read as follows:

> "Wage rates and commissions for any employees of any leased department included within the bargaining unit covered by this Agreement shall be subject to negotiations between the Union and such leased department, and if the parties to such negotiations are unable to reach agreement within sixty (60) days after the date that this Agreement becomes applicable to the employees of leased department; there shall be no strike, lockout, picketing or cessation of work as between the Union and such leased department, but the Union or the leased department may require submission of the determination of such rates and commissions to arbitration in accordance with the provisions of Article XII, Sections E through J, of this Agreement.

Notwithstanding the provisions of said Sections, the arbitrator shall be expressly empowered to determine said dispute wage rates and commissions. For the purpose of this paragraph a leased department shall be considered a grieving party."

(d) Licensee agrees, to the extent permitted by law, that in the event Licensor shall, during the term hereof, enter into any collective bargaining agreement with a labor organization for employees employed in any store not covered by any of the collective bargaining agreements hereinabove in paragraph (a) referred to covering classifications of work performed by Licensee's employees in such store or stores, the Licensee shall, upon receipt of Licensor's written demand, agree in writing to be bound by the terms and provisions of said collective bargaining agreement or agreements and any amendment or extension thereof.

(e) The provisions of subparagraphs (a), (b), (c) and (d) hereinabove shall be inapplicable to the department of the Licensee in any store where the employees of such Licensee have been or may hereafter be determined by the National Labor Relations Board to constitute a separate bargaining unit until and unless the Retail Clerks local in question is certified as the collective bargaining representative of such employees.

(f) Non-supervisory employees of the Licensee who are not covered by any collective bargaining agreement as in this paragraph provided, shall receive equivalent wages and shall enjoy benefits, hours and working conditions no less favorable than those provided for Licensor's employees in the same store or stores covered by a collective bargaining agreement between Licensor and any labor organization.

(g) Licensee's failure to comply with the provisions of subparagraphs (b), (c) or (d) of this paragraph 25 shall not be deemed a default under this Agreement if Licensee, upon demand by any of the labor organizations referred to in this paragraph for compliance with any of the provisions of said subparagraphs, promptly commences proceedings before the National Labor Relations Board under any applicable provision of the National Labor Relations Act, as amended, to seek determination of the applicability of such provision or provisions of this paragraph to any of Licensee's employees.

26. ATTORNEYS' FEES.

It is agreed that in the event either party brings suit to enforce any of the terms and provisions of this License Agreement, any judgment shall include reasonable attorneys' fees to the successful party. Should Licensor, without fault on Licensor's part, be made a party to any litigation instituted by or against Licensee or instituted against Licensor without joining Licensee arising out of or resulting from any act or transaction of Licensee, Licensee agrees to pay to Licensor the amount of any judgment rendered against Licensor and all costs and expenses, including reasonable attorneys' fees, incurred by Licensor in or in connection with such litigation.

27. SUBJECT TO LEASE.

It is understood and agreed that this License Agreement and each and all of its conditions, provisions and obligations herein contained, shall in every respect be subject to all of the restrictions, limitations and conditions of that certain lease dated ....., between Licensor as lessee and ....., as

lessor, covering the real property described in Exhibit "A" attached hereto of which said department is a part thereof. In the event said lease hereinabove referred to is terminated, then and in that event this License Agreement shall automatically terminate and end as of the date of termination of said lease.

28. NOTICES.

All written notices or demands of any kind which either party may be required or desires to serve on the other under the terms of this agreement may be served, as alternative to personal service, by mailing a copy thereof by certified mail, postage prepaid, addressed to the other as follows:

For service upon Licensor:

White Front Stores, Inc.
5555 East Olympic Boulevard
Los Angeles 22, California
and

Interstate Department Stores, Inc.
111 Eighth Avenue
New York 11, New York

For service upon Licensee:

Mr. Francis J. Esgro
1622 North Highland Avenue
Hollywood 28, California
and

.....
1622 North Highland Avenue
Hollywood 28, California

In case of service by mail, it shall be deemed complete at the expiration of the second day after the date of mailing.

29. GENERAL PROVISIONS

This License Agreement expresses the entire agreement of the parties and there are no warranties, representations or agreements between them except as herein contained. This agreement may not be modified, amended or supplemented except by a writing signed by both Licensor and Licensee. No consent given or waiver made by either party of any breach by the other of any provision of this agreement shall operate or be construed in any manner as a waiver of any subsequent breach of the same or of any other provision. If any portion or provision of this agreement be declared by any court of competent jurisdiction to be invalid, the remaining portions or provisions of this agreement, nevertheless, shall remain in full force and effect. The titles of the various paragraphs hereof are intended solely for convenience of reference and are not intended and shall not be deemed for any purpose whatsoever to modify, extend or place any construction upon any of the provisions of this agreement. As used in this License Agreement, the terms "Licensor" and "Licensee", and all other terms used in the singular number, shall apply when necessary to the plural number. If "Licensee" consists of more than one person, the obligations of "Licensee" shall be the joint and several obligations of such persons. Upon the termination of this License Agreement, Licensee agrees that he will not at any time thereafter, in any way, directly or indirectly, advertise or permit the advertising of merchandise or

otherwise offer the same for sale at any place as "White Front" merchandise or otherwise mention or refer to "White Front."

EXECUTED this .... day of ....., 1963.

WHITE FRONT STORES, INC.

By .....
"LICENSOR"

By .....
"LICENSEE"